

MM Dkt. 92-51

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Federal Communications Commission
Office of the Secretary

In Re)

Petition for Declaratory)
Ruling That Lenders May Take)
A Limited Security Interest)
In An FCC License)

MMB File No. 910221A

Seller Financing of Broadcast)
Station Transfers)

MMB File No. 870921A

To: The Commission

COMMENTS

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Dated: April 15, 1991

The law firm of Semmes, Bowen & Semmes ("SB&S")^{1/} hereby submits comments on the requests submitted to the Commission for the issuance of declaratory rulings in regard to whether a lender is permitted to obtain a security interest in a construction permit, authorization or license issued by the Commission.^{2/} In support thereof, SB&S states as follows:

A. PRELIMINARY STATEMENT

1. The telecommunications industry is a major and constantly evolving element of the economy. Its individual components, be they radio stations, television stations, cellular telephone systems, etc., require sizable investments for equipment and working capital purposes. While there are entities in the telecommunication industry that can secure this needed capital internally or through access to the public equity or debt markets, there are many others that must look to banks and other commercial lending institutions for secured asset-based financing.

2. One of the issues confronted by a communications lender is the security that the lender can look to in the event of a borrower default. The importance of this is that the lender, through a security interest, can assure itself that

¹Semmes, Bowen & Semmes is a law firm partnership that numbers among its clients broadcast stations and financial institutions specializing in lending to communications ventures.

²For sake of convenience, we will use the term "license" to cover all licenses, construction permits and authorizations.

assets are available that the lender, in a priority position, can foreclose upon and recover proceeds from its debtor sufficient to make the lender whole on its loan. This is more than a theoretical concern, in that a federal bankruptcy court has recently held that since a lender's security interest did not extend to a station license, the lender's priority position was limited to the liquidation value of its physical assets.^{3/} As a consequence, the lender found that its security interest no longer had a value equal to its outstanding loan. As for the difference between the liquidation value and the station value, the lender was in no better position than an unsecured debtor. This has had a chilling effect on communications lenders and, in all likelihood, was a motivating factor for the Hogan & Hartson Petition.

3. It is well known that the entire commercial lending industry is in disarray. Capital for new communications ventures, or to refinance existing ones, can no longer be had from most conventional sources. While the causes for this capital crisis are many and varied, the reality is that there are fewer institutions making communications loans. Given the questions that have arisen over the Oklahoma City case, the Commission must reconsider whether its policy prohibiting a security interest in a license is having a detrimental effect on the ability of the telecommunications industry to raise capital

³In Re Oklahoma City Broadcasting Co., d/b/a KGMC-TV, Debtor, 112 B.R. 425 (Bankr. W.D. Okl. 1990).

in the commerical lending markets.

B. THERE EXISTS NO LEGAL BASIS WHICH PROHIBITS A LENDER FROM OBTAINING A SECURITY INTEREST IN A LICENSE

4. There is no question that the policy applied by the Commission has as its basis a series of Commission decisions which prohibit a lender from taking a security interest in a Commission issued license.^{4/} The Commission has reasoned that the license issued by it is not a property right. Since a security interest can only attach to a property right, the Commission has gone on to hold that a license can not serve as security for a lender.

5. A review of these decisions, and others, does not reveal a statutory basis for the Commission's position in regard to security interests. At various times, Sections 301, 304, 309 and 310 of the Communication Act have been mentioned.^{5/} Yet, while these sections of the Act clearly provide that the radio spectrum is allocated and licensed by the Commission, they do not contain any restriction that prevents the Commission from issuing a decision that the interests of licensees in the licenses issued to them are of such a nature and degree that a security interest may be perfected in them.

6. Operating licenses issued by federal, state, and

⁴See, e.g., Kirk Merkley, 94 FCC 2d 829 (1983), recon., 56 RR 2d 413 (1984); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 FCC 2d 1249 (1985).

⁵Id.

local agencies are not unknown to our lender clients. They often deal with entities that hold motor carrier licenses, alcoholic beverage licenses, or certificates of public convenience and necessity. As Hogan & Hartson indicated in its Petition, these licenses have often been determined, by state and federal agencies, to be sufficient property interests for lenders and others to take security interests in them and enforce against in the event of default. The same policies applicable to these licenses should be applied by the Commission to the licenses it issues.

7. There is ample basis for the Commission to revise and amend its prior decisions in this area without disrupting the FCC's regulatory role. Such a result would provide only that there are no statutory restrictions against the provision of security interests in FCC issued licenses. As to whether to grant a security interest, in any individual license, this would, of course, be the decision of the individual licensee.

B. A CHANGE IN POLICY WOULD NOT IMPEDE THE COMMISSION'S RESPONSIBILITIES UNDER THE COMMUNICATIONS ACT

8. We submit that the requested policy change should not and will not impede primary Commission goals. In particular, there is no intention to turn a license into a property right that could, without limitation, be fully traded in the marketplace. Rather, the right to perfect a security interest in a license can reasonably co-exist with all of the Subchapter III obligations and duties vested in the FCC.

9. To this end, a perfected security interest should not affect the Section 310(d) right of the Commission to undertake its own review of the qualifications of parties involved in assignments and transfers. We would expect any change in Commission policy in this regard to include a provision that a party could not utilize its Uniform Commercial Code rights to dispose of the collateral when default occurs under its security interest^{6/} and assign a license to itself or a third party, absent prior FCC consent. Rather, as is now done in regard to stock pledges,^{7/} the consummation of any assignment would be subject to compliance with UCC provisions and prior Commission consent. The effect of this would be to maintain the current regulatory scheme, while offering additional financial protection to the lender, though a security interest in all of its borrowers' collateral.

10. We urge that the Commission weigh the benefits of such a change against any detrimental effects. The benefits are that existing lenders will have added comfort in their communications lending and new lenders will not avoid the industry owing to a fear that their security in collateral will be found not to cover the full extent of any loan extended. This can, we expect, result in more money being available for growth


⁶See Sections 9-501, et seq. of the Uniform Commercial Code.

⁷See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, supra, 99 FCC 2d at 1254.

and expansion of existing operations and licensees and for the entry of new ones. Against this, the only detriment appears to be the Commission's concern that its statutory obligation to be the arbiter of who operates licensed facilities will be eliminated. In that we have been able to show that the requested policy change does not alter the Commission's control over licenses and offers additional liquidity to the industry, the benefits far outweigh any limitations. Therefore, we submit that they should be adopted forthwith.

Respectfully Submitted,

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